DEC 28 2010

No. 10-341

In the Supreme Court of the United States

PRECISION PINE & TIMBER, INC.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONER'S REPLY BRIEF

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

As stated in the petition, Petitioner Precision Pine & Timber, Inc., makes the following disclosures:

There are no parent corporations or any publicly held companies owning 10% or more of Petitioner's stock.

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REPLY

Disappointingly, in its Brief in Opposition ("Opposition" or "Opp.") to Precision Pine & Timber, Inc.'s ("Precision") Petition for a Writ of *Certiorari* ("Petition" or "Pet."), the government has not been forthright with this Court in its treatment of the following issues:

1. The government argues that "[a]t all times the suspensions were necessary to comply with the district court's order. . . ." Opp. 6.

This statement, although literally true, also wholly ignores the pivotal point in this case that: (1) the district court's order enjoining the Forest Service from permitting on-the-ground activities in the National Forests of Arizona and New Mexico until it fulfilled its consultation obligation under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, and (2) the resulting suspension of Precision's 14 timber sale contracts for consultation were both the direct result of the Forest Service's steadfast refusal, for a period of years, to comply with its well-established legal obligations to consult. Pet. 3-4. Indeed, well before the district court issued its order, the Department of Justice ("DOJ") advised the Forest Service that defending the agency's longstanding refusal to abide by binding Ninth Circuit precedent requiring consultation in the circumstances here present could subject DOJ lawyers to Rule 11 sanctions. Pet. 6

As the trial court correctly held, under Federal Circuit precedent the Forest Service's actions in causing, and then prolonging, the suspensions for a total of 467 days were unlawful and wholly

unreasonable and therefore breached 11 of Precision's contracts. Petitioner's Appendix ("Pet.App.") 8a. Moreover, both the district court's order directing the Forest Service to consult and the resulting suspension of Precision's contracts during consultation were entirely avoidable had the Forest Service simply complied with the law years earlier as its lawyers had advised.

2. The government argues that "[T]he sovereign acts doctrine has no relevance here because the court of appeals in this case did not address it, much less establish a new defense based on it." Opp. 5.

The government's statement is simply not true. In *Precision Pine*, the Federal Circuit relied on two cases, *Centex Corp. v. United States*, 395 F.3d 1283 (Fed. Cir. 2005), and *First Nationwide Bank v. United States*, 431 F.3d 1342 (Fed. Cir. 2005), in which the issue had been whether the government could avoid liability for breaching the contracts because the breaches had been caused by the government in its sovereign capacity. Pet.App. 23a. In both cases, the Federal Circuit concluded that Congress' enactment of the Guarani Legislation, *i.e.*, the putative sovereign act, was specifically targeted at the plaintiffs' contract rights and thus did not constitute a sovereign act. Accordingly, the government was held to have breached the implied covenant of good faith and fair dealing by eliminating a material part of the contract's consideration. *Id.*

Even though in the instant case, as the government acknowledges, it did not raise the sovereign acts defense to Precision's claim that the Forest Service

had breached its contracts (Opp. 5), the Federal Circuit nevertheless extracted from *Centex* and *First Nationwide* the basic elements of the test for determining whether the government's actions that breached the contracts were taken in a sovereign capacity and applied them, stating:

> We conclude that there was no breach of the of the government's implied duty of good faith and fair dealing because the Forest Service's actions during these formal consultations were (1) not "specifically targeted," and (2) did not reappropriate any "benefit" guaranteed by the contracts, since the contracts contained no guarantee that the [sic] Precision Pine's performance would proceed uninterrupted.

Pet.App. 23a.[1] The quoted language is the first prong of the test used by the Federal Circuit in *Centex* and *First Nationwide* to determine whether or not the government could avoid breach of contract liability based on the sovereign acts defense.[2] Indeed, other

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[1] The Federal Circuit's reference to the "implied duties of good faith and fair dealing" is potentially misleading. Throughout the proceedings below, Precision actually alleged violations of the government's related duties to cooperate and not to hinder its performance. Pet. 8. It is well-established that, to demonstrate a violation of any of these duties a contractor need not show that the government acted in "bad faith" or with malice toward its contracting partner, but only that the government's actions were commercially unreasonable (Pet. 10-11), something that Precision readily demonstrated here.

[2] The Federal Circuit in *Precision Pine* ignored the fact that, for a sovereign act (*i.e.*, a proper and legal governmental action that is not specifically targeted at the contract in issue) to absolve the

than *Precision Pine*, the government identifies no case that did not involve the application of the sovereign acts defense in which a court inquired into whether the government's actions were "specifically targeted" at the plaintiff's contracts.

In this regard, the government also ignores Precision's reliance on the fact that Professor Emeritus Ralph C. Nash, Jr., a pre-eminent authority on government contract law, has described *Precision Pine* as having created a new, "mini-sovereign acts" defense. *See* Ralph C. Nash, Jr., "Postscript: Breach of the Duty of Good Faith and Fair Dealing," 24 No. 5 Nash & Cibinic Rep., ¶ 22 (May 2010).

3. The government asserts that the Federal Circuit held that "the decision below does not conflict with *Scott Timber*." Opp. 5. ("Our conclusion is consistent with this court's decision in *Scott Timber Co. v. United States*, which similarly concerned the government's obligations arising out of timber contracts between the Forest Service and a private party"). *See* Pet.App. 17a.

The government's contention is extremely disingenuous. The "conclusion" being discussed by the

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government of liability for breach, the government must also demonstrate that the common law test for impossibility of performance has been met. *See United States v. Winstar Corp.*, 518 U.S. 839 (1996) (plurality); RESTATEMENT (SECOND) OF CONTRACTS § 261. Pet. 10-16. The government, in its briefing to this Court, ignores Precision's contention that the test as applied by the Federal Circuit runs afoul of this aspect of the Court's teaching in *Winstar*.

Federal Circuit in the passage quoted by the government was not made with respect to Precision's claim that the Forest Service had breached its implied contractual duties to cooperate and not to hinder. On the contrary, the Federal Circuit's "conclusion" dealt solely with its concurrence with a portion of the holding in *Scott Timber* that the language of standard contract clause CT6.25 did not create an implied warranty.[3] This is made abundantly clear in the sentence that follows the quote upon which the government relied: "*Scott Timber* held that an identically-worded provision (C6.25) did not create a warranty 'as to any measures actually taken.'" Pet.App. 17a. This aspect of *Scott Timber* is not relevant to whether the Forest Service's suspension of a timber contractor breached the Forest Services implied duties to cooperate and not to hinder.

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[3] Although Precision also disagreed with the Federal Circuit's reversal of the trial court's ruling that the government had breached an implied contractual warranty, Precision elected not to appeal that ruling. Notably, however, the Federal Circuit's recent rulings relieving the government from implied contractual duties that have been routinely applied to it (and private contractors) is also at issue in *Agredano v. United States*, Supreme Court No. 10-99 (Pet. for Cert. pending). Unless addressed by this Court, these rulings will continue to embolden the government to take unreasonable actions to the commercial detriment of its contracting partners.

4. The government also asserts that the Federal Circuit's decision is consistent with the holding in *Scott Timber*. Opp. 6.[4]

In this argument the government fails to explain how the long-standing reasonableness standard for assessing whether there has been a breach of the implied contractual duties to cooperate and not to hinder can be squared with the Federal Circuit's adoption of a new standard in *Precision Pine*. The new standard rejected ample proof of objectively unreasonable conduct that had been adequate to establish a breach of contract for decades, and substituted a hitherto unknown standard requiring proof that the government's actions were "specifically targeted" at the contractor and "reappropriated" a contractual benefit. The reason that the government fails to address this point is because the standards, one of which is objective and the other of which is subjective, are wholly inconsistent with one another. As Professor Nash has explained, in *Precision Pine*, the Federal Circuit "has articulated a standard . . . which flies in the face of almost all prior decisions." 24 No. 5 Nash & Cibinic Rep., ¶ 22. Indeed, by applying this new standard, the Federal Circuit was able to conclude that, although certain actions taken by the Forest Service after the district court ordered it to consult violated that order and prolonged the suspension (Pet. App. 22a), even such "misbehavior" did not constitute a breach of the implied duties to

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[4] In support of its view, the government only refers to the Forest Service's need to comply with a court order. *Id.* Once again, however, the government ignores the fact that the Forest Service's failure to comply with its obligations under environmental law caused the suspension in the first place. *See* point 1 *supra*.

cooperate and not to hinder performance. Such a conclusion would not have been possible had the court applied the objective reasonableness standard that was applied in *Scott Timber*.

The insincerity of the government's assertion that the Federal Circuit's decision in *Precision Pine* is consistent with its decision in *Scott Timber* is laid bare by a recent DOJ filing. In *Zip-O Mills, Inc. d/b/a Zip-O Timber Co. v. United States*, Court of Federal Claims No. 04-1123C, the DOJ is defending the Forest Service against an action for the breach of a timber sale contract by arguing that *Precision Pine* stands for the proposition that "the timber purchaser could not maintain a breach claim *based upon an unreasonable suspension* where the Forest Service was authorized to suspend performance under CT6.01(b) in order to comply with a court-ordered injunction." *See id.*, Dkt. No. 87 at 9 (emphasis added).[5] The holding in *Scott Timber*, which is supported by decades of Federal Circuit precedent, is diametrically opposed to allowing

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[5] In fact, two of the lawyers who filed the government's Opposition in this Court also were listed as counsel on the filing in the *Zip-O* case at the Court of Federal Claims. Thus, these inconsistent positions are not the result of one arm of the DOJ not being aware of what the other is doing. Moreover, in arguments made to this Court in *General Dynamics Corp. v. United States*, Supreme Court Nos. 09-1298, 09-130 (Pet. for Cert. granted), the government also relies on the Federal Circuit's decision in *Precision Pine* in an attempt to absolve itself of liability for breach of contract should this Court find that the Federal Circuit's opinion in *General Dynamics* should be remanded. *See Id.* Government's Brief at 53. This is further evidence of the government's effort to expand the pernicious effect of the Federal Circuit's incorrect ruling in *Precision Pine*.

the government to act in an unreasonable manner with impunity as the court has done in *Precision Pine*.

Simply put, the government cannot square the circle of the plain contradiction between *Scott Timber's* holding that, for a suspension under C[T]6.01 not to violate the implied duties to cooperate and not to hinder, it must be "reasonable," and *Precision Pine's* holding that, even an indisputably unreasonable suspension accomplished under the very same contract provision, does not breach those duties unless the agency's actions, even if admittedly unlawful, are also "specifically targeted" at the contractor and "reappropriated" the benefits of the contract.

5. The government asserts that "[a]ny inconsistency between decisions of the Federal Circuit [in *Scott Timber* and *Precision Pine*] would not be a basis for this Court's review" because the inconsistency is merely an intra-circuit split. Opp. 5.

The government's assertion ignores the argument set forth in the Petition at 2 n.1:

> Where [as here] the Federal Circuit has been given essentially exclusive jurisdiction over an area of the law that is of special importance to the entire Nation (such as the law of government contracts), a grant of *certiorari* is particularly warranted. *See Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 89 (1993).

This Court's one-page ruling in *Wisniewski v. United States*, 353 U.S. 901 (1957), relied upon by the government, is not to the contrary. In *Wisniewski*, the

Court declined to accept a question that had been certified by the Eighth Circuit in order to resolve a divergence of opinion between two panels of that court regarding application of a federal regulation. *Id.* Naturally, the interpretation of that regulation could readily have been the subject of decisions by other circuit courts and thus have reached this Court based on a spilt between circuits. That is not possible with regard to matters within the exclusive appellate jurisdiction of the Federal Circuit. Due to the nation-wide effect of Federal Circuit decisions, such splits, which cannot be tempered in any way by decisions from other circuits, can be particularly disruptive. Pet. 20 n.20. Because the Federal Circuit has exclusive jurisdiction over several important areas of law, including the law of government contracts, splits between panels of the Federal Circuit, not remedied by a rehearing *en banc*, such as in the instant case, are particularly appropriate for this Court's review.[6]

> 6. The government argues that "Petitioner identifies no case that suggests that the [Federal Circuit's] decision conflicts with the 'accepted common law standards' of good faith and fair dealing that apply in any other circuit." Opp. 7.

The government's contention misses the mark because Petitioner did cite several cases in addition to *Scott Timber* that are binding in the Federal Circuit, as well as several treatises, all of which apply a

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[6] As this Court is certainly aware, a Petition may also be granted on the basis that it presents an important question of federal law or for any other "compelling reason." Supreme Court Rule 10.

reasonableness test to an alleged breach of the implied contractual duties. Pet. 10-12. Federal common law, which is applied by the courts and boards in government contract cases, has uniformly used the same reasonableness test in assessing breaches of the government's implied duties. *Id.* These authorities were discussed in the Petition but ignored by the government. Pet. 20-26, 31-32. Moreover, the consistent application of the reasonableness standard has directly benefited the government:

> Contractors selling supplies and services to the Government have traditionally priced such supplies and services on the basis that the law will protect them from unreasonable conduct by the Government during the performance of the contract. This belief has been fostered by decades of decisions by the boards of contract appeals and the courts granting equitable adjustments, price adjustments or damages when the Government does not meet this reasonableness standard. The Government has been the major beneficiary of this traditional view in the fact that, while it has occasionally been required to pay additional compensation to a contractor, it has obtained lower prices on many, if not most, of its procurements.

24 Nash & Cibinic Report, ¶ 68. The *Precision Pine* ruling, if not reversed, will likely increase government costs as contractors factor a contingency into every bid for the risk that the government can escape liability for failing to act reasonably even to the point of willful

non-compliance with its own pre-award environmental legal obligations.[7]

CONCLUSION

> It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals.

State of the Union Address (1861) Cong. Globe, 37th Cong., 2d Sess., app. 2 (1862). These words of President Abraham Lincoln, which led Congress to create the predecessor to the Court of Federal Claims and the Federal Circuit Court of Appeals, are etched prominently in marble on the building that houses these two courts today. Unfortunately, the government's failure to forthrightly address the central issues presented in the Petition threatens to render President Lincoln's promise of justice meaningless in the context of commercial transactions with the government. The Federal Circuit's ruling in *Precision Pine*, if allowed to stand, will disrupt the settled expectations of government contractors nationwide, who rightfully anticipate commercially fair and reasonable treatment by their government.

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[7] The severe impacts that will flow to timber sale contractors and, indeed, to all government contractors, is set forth persuasively in the Brief of Amici Curiae, *Federal Timber Sale Purchasers, et al.*, that has been filed in this matter. For the views of a prominent practitioner of government contracts law, *see also* Feature Comment "Fed. Cir. Resets Standard For Breach Of The Duty To Cooperate And Not To Hinder," 52 Government Contractor ¶ 97 (Mar. 18, 2010).

The government's failure to squarely address the significant issues raised in the Petition has done a disservice to this Court, the community that contracts with the government, and the taxpaying public.

For the reasons noted herein and raised previously, the Court should grant the Petition.

Respectfully submitted,

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